SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY and RALPH T. SEWARD, Chairman of Arbitration Board 282,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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The long existing, extensive and continuing controversy as to the validity of awards by special boards of adjustment which arbitrated part of the "railroad work rules dispute" under P. L. 88-108 as delegatees of the arbitration board created by Congress without complying with the procedures established by P. L. 88-108 for the conduct of the arbitration and whether such awards would, if sustained, deprive petitioner and the railroad employees it represents of contract rights without due process of law should be resolved by this court in view of the vascillating, contradictory and belated opinions and decisions of the courts below, the last of which would, if sustained, preclude a determination of the controversy on its merits contrary to a prior opinion of the court below	9
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Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The Brotherhood of Railroad Trainmen respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on May 19, 1967, Court of Appeals Nos. 20,212 and 20,213.

OPINIONS BELOW.

The opinion of the District Court is reported at 252 F. Supp. 961 (1966) (R. 89). The opinions of the Court of Appeals are not yet officially reported; they are unofficially reported at 65 LRRM 2365; they are appended hereto (Appendix A).

JURISDICTION.

The judgment of the Court of Appeals was dated and entered May 19, 1967 (R. 102 and Appendix B, p. 42). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). (Appendix C.)

QUESTIONS PRESENTED.

1. Whether that part of the railroad "work rules" arbitration, ordered by Congress in Public Law 88-108, and which was delegated by the arbitration board [No. 282] established by Congress in that Act to "special boards of adjustment", which were provided for in the Award of Arbitration Board No. 282, was required to be conducted by such special boards in accordance with the procedures and within the procedural restrictions prescribed by Congress for the conduct of the arbitration; i. e., whether such "special boards of adjustment" were required to conduct the arbitration delegated to them in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act to the extent Board 282 was required to do so and whether the awards of the special boards were subject to Section 9 of the Railway Labor Act to the extent the Award of Board 282 was subject thereto.

2. Whether the judgment in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11 (D. C. D. C. 1964), *aff'd* 331 F.

2d 1020 (D. C. Cir. 1964), *cert. denied* 337 U. S. 918 (1964), prior to the establishment of any such "special boards of adjustment" or the commencement of any of their proceedings, and prior to any issue having arisen concerning what procedural requirements are applicable to such special boards, is *res judicata* of Question No. 1.

3. Whether the refusal of a special board of adjustment to comply with Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to them by the Award of Board 282 and the decisions of the Court below denying judicial review of the awards of special boards as provided by Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act deprive petitioner of contract rights without due process of law.

STATUTES INVOLVED.

The pertinent provisions of Public Law 88-108, 77 Stat. 132, 45 U. S. C., § 157 (1966 Supp.), and the Railway Labor Act, 45 U. S. C., § 151 ff, are set forth in Appendix C, pp. 5a-10a.

STATEMENT.

This case is related to three other cases in which petitions for writs of certiorari are being filed by petitioner. The other petitions relate to the Chicago, Milwaukee, St. Paul & Pacific Railroad and to the Missouri Pacific and affiliated railroads. Another relates to the Terminal Railroad Association of St. Louis.

This case stems from Public Law 88-108, 77 Stat. 132, 45 U. S. C., § 157 (1966) Supp. which was approved August 28, 1963, and was enacted to prevent the resort to "self-help" by the parties to a national railroad "work rules" dispute after this Court had determined in *Brotherhood of Locomotive Firemen & Enginemen et al. v. Baltimore &*

Ohio R. Co. et al., 372 U. S. 284 (1963) that "self-help" was available to them. The act provided for the compulsory arbitration of two of several disputes, the "firemen on diesels" issue and the "crew consist" dispute. It is the crew consist issue which is involved here, i.e., the number of employees required to be in road and yard service crews as distinguished from engine crews.

The Act provided for an arbitration board which has become known as "Arbitration Board 282". It made an award which, pursuant to the Act, was filed in the United States District Court for the District of Columbia and became effective on January 25, 1964. The constitutionality of the act and the validity of the award were upheld in *Brotherhood of Locomotive Firemen & Enginemen et al. v. Chicago, Burlington & Quincy R. Co. et al.*, 225 F. Supp. 11 (D. D. C. 1964), *aff'd* 331 F. 2d 1020 (D. C. Cir. 1964), *Cert. denied* 377 U. S. 918 (1964) (R. 59-60).

Section 3 of Public Law 88-108 provided that "[t]he arbitration board shall make a decision, pursuant to the procedures hereinafter set forth" as to the disposition to be made of those disputes and also provided in Section 4 that "[t]o the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to Section 9 of said Act" (App. C, p. 5a).

The award made a "national rule" disposing of the "fireman issue" so that no further arbitration of that issue was necessary. However, as to the "crew consist issue", the Arbitration Board found that a national prescription of road and yard crew size would be wholly unrealistic, that the consist of crews necessary to assure safety and to prevent undue workloads was dependent upon a great complex of local factors and, therefore, should be determined by "special boards of adjustment" upon the basis

of local conditions according to certain "guidelines" which were set forth in its Award (41 Lab. Arb. 693-694; R. 56-58).

Thus, Arbitration Board 282 itself made no change in the consist of any crew. Instead, it delegated its arbitral authority under the Act of Congress to special boards of adjustment and they conducted the arbitration of the dispute with which Congress was concerned.

The Award provided a procedure for establishing special boards of adjustment but was silent as to the procedure to be followed by a special board in conducting the arbitration delegated to it (R. 55-56).

As provided in Award 282, the carrier proposed revisions in crew consists, and, failing agreement, a special board of adjustment was established (R. 12, 16, 19-22).

Petitioner requested the railroad to join in a request to the National Mediation Board for it to pay the costs and expenses of the neutral member and any incidental expenses of the special board in accordance with the provisions of the Award of Board 282 and sent a copy of that request to the neutral member of the special board and to the National Mediation Board (R. 24-25, 41-42). The railroad refused (R. 26-27).

Petitioner notified the neutral and the railroad member of the special board that it objected to the special board proceeding unless it did so in compliance with Sections 7 and 8 of the Railway Labor Act so that the award would be subject to "meaningful review" under Section 9 of the Railway Labor Act (R. 27-29).

Petitioner's objection to the special board not proceeding in accordance with Sections 7 and 8 of the Railway Labor Act was overruled by the neutral and railroad

members (R. 29, 42). Thus a meaningful Section 9 review was precluded.

The special board here involved, like the special boards on the Missouri Pacific and its subsidiary railroads and on the Milwaukee Road, did not follow the procedures of Sections 7 and 8 of the Railway Labor Act prescribed by Congress to be followed in conducting the arbitration imposed on the parties by Public Law 88-108. It appears here, by way of affidavit, that witnesses were sworn and, from the award, that some of the hearings were held in a federal building, but the board did not make or certify a transcript of its proceedings nor of the evidence taken by it (R. 9, 30, 43-44, 49).

The special board rendered its award July 14, 1964 granting the carrier's proposal in its entirety (R. 31).

In pursuance of the opinion of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, 345 F. 2d 985 (1965) holding that awards of special boards were subject to initial review by Arbitration Board 282 and, thereafter, judicial review under Section 9 of the Railway Labor Act and the judgment of the Court in that case, remanding it so that initial review of the special board award involved in it by Board 282 could be obtained and in pursuance of the similar action by the Court of Appeals for the District of Columbia in *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 with respect to the special board awards involved in that case, petitioner sought initial review by Arbitration Board 282 of the award of the special board involved in this case, challenging its validity on various grounds including the refusal of the special board to comply with the procedures of Sections 7 and 8 of the Railway Labor Act (R. 7-11).

Board 282 sustained the award on the basis of its prior ruling with respect to special boards on the Missouri Pacific and its affiliated railroads that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act (R. 63-64, 66-78).

Thereupon petitioner instituted two actions in the United States District Court for the District of Columbia to set aside the special board award and to impeach the ruling of Arbitration Board 282. One was filed in the case in which judgment had been entered on the Award of Arbitration Board 282 and the other was an independent action. Those actions were based upon identical grounds, were consolidated and proceeded thereafter as one action (R. 2, 32-40, 59-60).

The District Court held that the special boards were not required to follow the procedures of Sections 7 and 8 of the Railway Labor Act and that their awards were not subject to judicial review under Section 9 which provides for setting aside awards on limited grounds but including the ground that the proceedings were not in substantial conformity with the procedures of Sections 7 and 8. *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co., and Certain Carriers, etc.*, 252 F. Supp. 961 (D. D. C., 1966).

That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit. The majority of the Court of Appeals did not pass on the applicability of Sections 7 and 8 of the Railway Labor Act to the proceedings of the special boards. It held that such issue was *res judicata* because petitioner had not raised the issue in the initial action seeking to impeach the original Award of Board 282, before there were any special boards of adjustment under that Award and before the question of any procedural restrictions on the special

boards had arisen (R. 12, 20-22, 30-31, 59, Apps. A., p. 1a and F, p. 14a).

Circuit Judge Wright dissented, as he did in *Brotherhood of Railroad Trainmen v. Missouri Pacific Railroad Co., et al.*, in which review is also being sought in this Court. In his dissent he considered that since Congress, conscious of the seriousness of its action in imposing compulsory arbitration, had provided mandatory procedural due process safeguards for the arbitration, it was inconceivable that Board 282 could delegate its arbitral authority to local boards without such safeguards being applicable to the local boards. He considered the ruling of the majority concerning *res judicata* was inconsistent with the decision of that Court in *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 (1965), in which case the Court, two years earlier, had, *sub silentio*, rejected the *res judicata* argument and remanded the parties to further proceedings under Public Law 88-108 and thereafter Section 9 of the Railway Labor Act. App. A, p. 3a.

REASONS FOR GRANTING THE WRIT.

The questions involved in this case are the same as those involved in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., et al.*, in which a petition for a writ of certiorari is being filed concurrently with this petition except that in this case petitioner participated in the proceedings before the special board and specifically requested the special board to comply with the procedures of Sections 7 and 8 of the Railway Labor Act and so, here, there is no issue of whether petitioner is precluded from challenging the procedural deficiencies of the special board and its award by having failed to participate in the board's proceedings.

Considerable controversy has been generated over the nature and legal status of the special boards and the awards which they have made (R. 66). That "considerable controversy" is further attested by the litigation involving them.

While only one special board is directly involved in this case and in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee St. P. & P. R. Co.* and only four special boards are directly involved in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., et al.*, in which petitions for writs of certiorari are filed concurrently herewith, the decision in this case may well effect many others. About two hundred railroads, together with petitioner and other unions representing operating employees were parties to Public Law 88-108 and the Award of Arbitration Board 282. *In Re Certain Carriers, etc.*, 231 F. Supp. at 520, *supra*. About ninety special boards made awards, as noted by the District Court in *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen*, 252 F. Supp. at 209. More specifically it appears from a stipulation to which the court referred in that case, and to which petitioner and respondent railroad were parties (App. F, p. 14a), and, as also is shown by the record in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., et al.*, filed concurrently herewith, more than one special board was convened and made an award on a single railroad or railroad system so that the nature and legal status of some eighty-three special boards on about forty railroads or railroad systems employing thousands of men actually are involved.

Reductions in the number of employees in crews in road and yard service pursuant to special board awards necessarily resulted in a change in the daily working conditions of those thousands of railroad employees who work in those reduced crews and of those who were deprived of

work as shown in *Brotherhood of Railroad Trainmen v. Terminal Railroad Association of St. Louis,* filed concurrently herewith.

The controversy over the nature and legal status of the special board awards has been aggravated by the decision of the United States District Court for the District of Columbia, now affirmed to the extent that it held that special board awards continue beyond the expiration of Public Law 88-108 and the Award of Arbitration Board 282 until changed in accordance with the provisions of the Railway Labor Act. *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen, et al., supra,* and *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.,* Nos. 20,152 etc., United States Court of Appeals for the District of Columbia Circuit, May 12, 1967 and July 31, 1967.

The controversy as to the nature and legal status of the special boards and their awards has been compounded by the confusion resulting from the vacillations and conflicting decisions of the courts which have considered the controversy, particularly those of the Court below.

The question of whether the contract rights of petitioner and the working conditions of the thousands of employees it represents may be changed by compulsory arbitration by tribunals purportedly acting under Public Law 88-108 without such tribunals complying with the due process procedural safeguards imposed by Congress in that Act, obviously, is a far reaching question of fundamental importance. The mistaken application by the majority below of the principle of *res judicata* does violence to that principle; it holds that the question of procedural requirements of the special boards is *res judicata* because not raised in an earlier proceeding, before there were any special boards and before any such procedural question had

arisen, because petitioner should have foreseen that such question would arise.

Unquestionably, if Board 282 itself had made the determinations made by the special boards, instead of delegating the arbitration to special boards, its action would be invalid if it did not comport with the procedural prescription of Public Law 88-108.

When petitioner first challenged awards of special boards on the grounds here involved the Court denied jurisdiction because it considered special board awards to be subject to initial review by Board 282 under the provisions of Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act and thereafter by the United States District Court for the District of Columbia under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act, the Award of Arbitration Board 282 having been filed in that court pursuant to Public Law 88-108. *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., et al.*, 230 F. Supp. 197, 201 (1964) (Pending on Cross Appeals and Stipulation of the Parties in the U. S. Ct. of App., 8th Circuit, Docket Nos. 17724 and 17749).

Immediately thereafter the United States District Court for the District of Columbia ruled that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act and their awards were not reviewable under Section 9 of the Railway Labor Act, notwithstanding the provisions of Section 4 of Public Law 88-108. *In re Certain Carriers, etc.*, 231 F. Supp. 519 (D. D. C. 1964).

While petitioner's appeal from that decision was pending, the Court below decided *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 345 F. 2d 958 (1965), and ruled that special boards were subject to the same procedural limitations and the same

judicial review as was Board 282 and its Award in addition to and after initial review by Board 282. This ruling was in accord with the opinion of the District Court in Missouri in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., et al., supra.*

Shortly thereafter, the Court below decided *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.,* 349 F. 2d 207 (1965). In that case the court considered the *Milwaukee* case required initial review of special board awards by Board 282 prior to judicial review and had remanded to permit such initial review.

Although the applicability of Sections 7, 8 and 9 of the Railway Labor Act under Public Law 88-108 and due process in the arbitration conducted by special boards are solely questions of law, petitioner sought review by Board 282 pursuant to these opinions and decisions of the court below (R. 3, 7, 33, 36).[1]

Based upon its earlier ruling with respect to the special boards of adjustment on the Missouri Pacific and its subsidiaries, Board 282 ruled that the special board here involved was not required to comply with Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to it (R. 2-6, 32-36, 60-78).

Thereafter petitioner sought judicial review of the special board award and the ruling by Board 282 under the opinions of the court below in the *Milwaukee* and *Brotherhood of Railroad Trainmen v. Certain Carriers* cases, *supra.* The District Court sustained the special board award and the ruling of Board 282, holding, as it had in *In Re Certain Carriers, etc.,* 248 F. Supp. 1008, where petitioner had sought review of special board

[1] Previously, in May 1964, petitioner had sought a ruling by Board 282 whether the provisions of Sections 7, 8 and 9 of the Railway Labor Act were applicable to special boards. Board 282 refused to answer the questions and referred the parties to the opinion of the district court in *In Re Certain Carriers, etc.,* 231 F. Supp. 519, *supra.* App. E, p. 13a.

awards on the Missouri Pacific and its subsidiaries, that none of the provisions of the Railway Labor Act were applicable to special boards. *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co., et al.*, 252 F. Supp. 961 (D. D. C. 1966).

In the ensuing appeal the majority of the Court below now holds that the judicial review, previously held to be available with respect to special board awards under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act, cannot be had because the question whether special boards were required by Public Law 88-108 to comply with the procedures provided by Sections 7 and 8 of the Railway Labor Act for conducting an arbitration has been *res judicata* since before the first decision of the Court of Appeals on the issues involved in this case—indeed, since before any special boards existed or convened or could have existed or convened—even though the Court of Appeals in both earlier decisions had presented to it the carriers' argument of *res judicata* and *sub silentio* rejected it (App. A, p. 4a, n. 4).

As the dissenting Judge below pointed out (App. A, p. 3a), the requirement that the arbitration be conducted in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act was mandatory. This is in accord with the mandatory language of Section 4 of Public Law 88-108 that the arbitration thereunder "shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act", which also, mandatorily, provide that arbitration boards "shall" follow specified procedures. The mandatory nature of those procedures is further reinforced by the provisions of Section 9 Third of the Railway Labor Act. Although it affords very limited grounds for impeaching an arbitration award it does include, as one such ground, the ground that the proceedings were

not in substantial conformity with the Railway Labor Act, i. e., Sections 7 and 8 and Section 9 Fourth provides that, if any part of an award is invalid on such ground, the entire award "shall" be set aside.

The majority of the Court of Appeals appears to have considered petitioner's complaints concerning the conduct of the arbitration by the special boards as an attempt to relitigate the validity of the Award of Board 282. They are not. They have been and are based upon the premise that the Award of Board 282 is valid, as was held in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra.* No special boards had convened and none had made an award at that time. *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, 16 (1964), and App. F, p. 14a.

The cause of action in this case is whether an award made by a special board on July 12, 1964 (R. 31) is valid, and is based upon omissions by the special board occurring long after the judgment in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra,* and upon ruling by Arbitration Board 282 on January 16, 1966, sustaining the award (R. 2, 30-32, 35, 77-78, 94). It is not the same cause of action as was in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra.* The majority of the court below acknowledged in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific R. Co., et al.*, which it decided the same day and in which a petition for a writ of certiorari is filed concurrently herewith that the issue here was not an issue in the 1964 case involving only the validity of PL 88-108 and the award of Bd. 282 case. The judgment entered February 28, 1964, in that case (R.

59) could not be *res judicata* of the issues in this case under a proper application of the doctrine of *res judicata*.

The following, from *Commissioner v. Sunnen*, 333 U. S. 591 (1948) at 597-598, is appropriate here:

> "It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. . . .
>
> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac, supra*, 353. And see *Russell v. Place*, 94 U. S. 606; *Southern Pacific R. Co. v. United States*, 168 U. S. 1; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. . . ."

The misconception and misapplication of *res judicata* by the majority of the court below undercuts and would preclude giving effect to the earlier opinions and decisions of the same court in the *Milwaukee* case *supra*, upon the basis of which the court in *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, felt constrained, as had been done in the *Milwaukee* case, to remand so the questions could be submitted to Board 282 (349 F. 2d at 210) al-

though, as noted in the dissent below, the question of *res judicata* was before the court and ignored at that time (App. A, p. 2a, n. 3; p. 4a, n. 4).

If the decision of the majority of the court below is allowed to stand the special boards which have purportedly changed collective bargaining contracts and the working conditions of trainmen and other railroad employees will thereby have become a law unto themselves and answerable to no authority, by authority of Arbitration Board 282, Public Law 88-108 to the contrary notwithstanding.

Underlying the foregoing questions is also the question whether petitioner and the railroad employees it represents will have been deprived of contract rights and will have had their working conditions changed without due process of law if the special board awards and the rulings by Arbitration Board 282 and the courts below are allowed to stand.

Petitioner has contended from the beginning that, to permit special board awards to stand, when the special boards which made them did not comply with Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, would deprive petitioner and the railroad employees it represents of rights without due process of law. *Brotherhood of Railroad Trainmen v. Missouri Pacific Railroad Company, et al.*, 230 F. Supp. 197 (D. C. Mo. 1964), *supra.*

In the *Milwaukee case, supra,* the court below, in 1965, considered "meaningful review" of special board awards, initially by Board 282 and, thereafter, by the courts under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act necessary to "ensure" that the delegated authority of special boards was exercised within prescribed standards, obviously, those "stand-

ards" being the procedures prescribed by Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act for conducting the arbitration and the "guidelines" established by the award of Board 282. 345 F. 2d at 987, notes 4 and 5. The district court, in the same case, per Robinson, J., now Circuit Judge, recognized that special board awards must withstand the test of the Fifth Amendment. *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 237 F. Supp. at 418 (D. D. C. 1964).

Arbitration Board 282 does not consider "due process" to require a special board to observe the procedural requirements of the Railway Labor Act which Public Law 88-108 prescribed for the conduct of the arbitration (R. 70).

Notwithstanding the dissent of Circuit Judge Wright in the court below on due process grounds (App. A, p. 3a), the majority of the court below did not then deal with the question. Instead, the majority ruled *res judicata,* petitioner's claims that special boards of adjustment, like Arbitration Board 282, were required to operate pursuant to the Railway Labor Act and take all evidence under oath and keep a transcript of their proceedings (App. A, pp. 1a-2a).

However, on July 27, 1967, in a further consideration of the *Milwaukee case, supra,* the same majority of the court below declared, referring to the prior opinions on May 19, 1967, in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co., et al.,* Nos. 19,867 20,003-04 and in this case that "we have previously upheld [Arbitration Board 282's] determination that due process was not violated by lack of a transcript". . . . Further, the majority said "we similarily affirmed the board's decision that a 'meaningful review' had been provided" (App. D, p. 12a).

The failure of an arbitration board to take evidence under oath or affirmation or to keep a record of its proceedings, including a transcript of the evidence, are, per se, grounds for impeachment of its award under Section 9 of the Railway Labor Act which was adopted by Public Law 88-108. It is equally apparent that, in the absence of a transcript, mandatorily required by Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, it is not possible, upon review, to determine whether evidence was taken under oath or affirmation or whether a party was accorded a fair hearing or whether the award was warranted by the evidence under the "guidelines" (R. 7-11) established by Board 282. Circuit Judge Wright also noted that fact in his dissent from the July 27, 1967 decision of the majority in the *Milwaukee case* (Appendix D, p. 12a). Board 282 recognized the necessity for a transcript for such a review but ruled that a party seeking review had the duty to provide the transcript notwithstanding the mandatory provisions of Public Law 88-108 and Section 7 Third (h) of the Railway Labor Act, placing such duty on the Board and notwithstanding Section 7 Third (g) of the Railway Labor Act and of the award by Board 282 which provide for the expense of making a transcript to be "shared equally by the parties." Board 282, like some of the courts below, now considers those provisions of the Railway Labor Act not to be applicable to special boards but only to Board 282 (R. 7, 63, 64, 70-71). *In Re Certain Carriers, etc.*, 231 F. Supp. 519 at 521 (D. D. C. 1964), 248 F. Supp. 1008 at 1012 (D. D. C. 1966), *supra.*

Now, the majority of the court below would foreclose resolution of the question on a belated and misconceived application of *res judicata.*

Circuit Judge Wright, in his dissent in this case, regards the mandatory procedural provisions of Sections 7

and 8 of the Railway Labor Act for evidence to be taken under oath or affirmation and for a transcript to be made by the arbitration board to be "due process safeguards" required by Congress when, by Public Law 88-108, it took the unprecedented action of substituting compulsory arbitration for the right to strike. Judge Wright noted that in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co., supra,* the court had approved Board 282's delegation of the arbitration required by Public Law 88-108 to special boards but said that "what this court did not approve was the delegation of the National Board's authority to the local boards without the due process safeguards required by the Act, i. e., Sections 7 and 8 of the Railway Labor Act." Continuing, Circuit Judge Wright said, "Appellees admit that the proceedings before the local boards in these cases have not been conducted pursuant to Sections 7 and 8 of the Railway Labor Act, and the union is here complaining of the local boards' failure so to proceed. Since Congress, in requiring the union to submit to compulsory arbitration, deemed the Sections 7 and 8 safeguards necessary for proceedings before the national Board, it is inconceivable to me that the national Board may legally delegate its authority to local boards without such safeguards" (App. A, p. 3a).

CONCLUSION.

Considering the unprecedented nature of the compulsory arbitration as a substitute for the right to strike; that the arbitration was not conducted by the board for which Congress provided but by delegates of that board; the vacillating, conflicting and belated decisions of Arbitration Board 282 and of the courts below, the latest of which would, if sustained, foreclose a definitive determination of the validity of special board awards which purport to change contracts and affect the daily work of

thousands of railroad employees, petitioner most sincerely and earnestly urges this Court to resolve the questions as to the validity of special board awards and the constitutional question.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

Before Bastian, *Senior Circuit Judge*, Burger and Wright, *Circuit Judges*.

Per Curiam: Appellant challenges the District Court's affirmance of rulings of Arbitration Board 282 that the local Special Board was not required to conduct its proceedings under Sections 7 and 8 of the Railway Labor Act and that the Special Board did not err in basing its award in part on awards made by other Special Boards and on an agreement with respect to "crew consist" made on another railroad.

Appellant contends that the Special Board was required to prepare at its expense a transcript of its proceedings and could not merely permit any party who desired a transcript to prepare one. The claim arises in a somewhat different posture than in *Bhd. of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, No. 19,867, D. C. Cir., May 19, 1967; in the instant case the Brotherhood participated in the hearings and made objections to the Special Board's ruling that it was not required to provide a transcript.

To the extent that the Brotherhood's claim is that the Award of Arbitration Board 282 directed the local Special Boards to prepare transcripts, it falls because of the limited scope of judicial review as to Board 282's ruling that it did not intend such a requirement in its Award. Railway Labor Act, § 9, 45 U. S. C., § 159 (1964). The Brotherhood's main contention is that the Joint Resolution[1] which established Arbitration Board 282 and di-

[1] Public Law 88-108, 77 Stat. 132 (1963).

rected it to operate in accordance with Sections 7 and 8 of the Railway Labor Act subjects the local Special Boards, as creations of Arbitration Board 282, to the same requirements. This argument comes too late. It is merely another effort to impeach the original Award of 282 as being inconsistent with the Joint Resolution; it could and should have been raised in the action impeaching the Award, to which the Brotherhood was a party.[2] The decisions in that case are *res judicata* on this contention.[3]

We find no basis for disturbing the District Court's refusal to impeach the ruling of Arbitration Board 282 that the local Special Board could base its decision in part on awards of other local Special Boards and on an agreement on another railroad. Railway Labor Act, § 9.

Affirmed.

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[2] Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. R. Co., 225 F. Supp. 11 (D. D. C.), *aff'd*, 118 U. S. App. D. C. 100, 331 F. 2d 1020, *cert denied*, 377 U. S. 918 (1964).

[3] Bhd. of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co., No. 19,867, D. C. Cir., May 19, 1967, slip opinion 5, n. 5. Judge Wright's dissent suggests that this issue is not resolved by principles of *res judicata* because this court remanded the issue to Arbitration Board 282 for its view after the Award had been upheld in the impeachment action. The remand would have been a meaningless gesture, he contends, if the issue was no longer open. Although the opinion is not clear on this point, it would seem that the remand was for the purpose of having Board 282 pass on the terms of its Award, rather than on the requirements of the Joint Resolution. The Board seems to have understood that to be its function, for its answer to the Brotherhood's question was that "the special boards of adjustment provided for in . . . Award 282 are not required by the terms of the Award to adhere to procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act." Even assuming the remand was directed at the requirements of the Joint Resolution, this would merely indicate our action was mistaken; it could not change the finality of the earlier impeachment decision.

Wright, *Circuit Judge, dissenting:* Public Law 88-108[1] provides for compulsory arbitration of two issues in the labor dispute between the railroads and the union: the use of firemen on locomotives, and the so-called crew consist issue. Thus, as to these issues, Congress took the unprecedented action of denying the union the right to strike. Conscious of the seriousness of its action, however, Congress provided adequate due process safeguards. It required that the proceedings before the compulsory arbitration Board "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act." Public Law 88-108, § 4.

Proceeding pursuant to the mandatory provisions of Sections 7 and 8 of the Railway Labor Act,[2] the compulsory arbitration Board resolved the fireman issue. With reference to the crew consist issue, it decided that local arbitration boards would be created to resolve this issue on a local basis, the action of the local boards to be reviewed by the national Board.

There is, of course, no provision in the Act for creation of local boards, but this action on the part of the national Board has been approved by this court.[3] What this court did not approve was the delegation of the national Board's authority to the local boards without the due process safeguards required by the Act, *i. e.*, Sections 7 and 8 of the Railway Labor Act.

Appellees admit that the proceedings before the local boards in these cases have not been conducted pursuant

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[1] 77 Stat. 132 (1963), 45 U. S. C., § 157 (1964).

[2] 45 U. S. C., §§ 157-158 (1964).

[3] See *Brotherhood of Loc. Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co.*, D. D. C., 225 F. Supp. 11, *affirmed*, 118 U. S. App. D. C. 100, 331 F. 2d 1020, *cert. denied*, 377 U. S. 918 (1964).

to Sections 7 and 8 of the Railway Labor Act, and the union is here complaining the local boards' failure so to proceed. Since Congress, in requiring the union to submit to compulsory arbitration, deemed the Sections 7 and 8 safeguards necessary for proceedings before the national Board, it is inconceivable to me that the national Board may legally delegate its authority to local boards without such safeguards.[4]

I respectfully dissent.

APPENDIX B.

Judgment Below.

Before: Bastian, Senior Circuit Judge, and Burger and Wright, Circuit Judges.

Judgment.

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the District Court appealed from in these cases is hereby affirmed.

Per Curiam.

Dated: May 19, 1967.

Separate dissenting opinion by Circuit Judge Wright.

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[4] The majority's ruling that this issue is precluded by *res judicata* because of our decision in *Brotherhood of Loc. Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co.*, *supra* Note 3, is difficult to understand. When this case was last before this court. *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 121 U. S. App. D. C. 230, 349 F. 2d 207 (1965), the *res judicata* argument was thoroughly explored in the briefs of these same parties. This court at that time remanded the Sections 7 and 8 safeguards issue to the Board. 121 U. S. App. D. C. at 233, 349 F. 2d at 210. I cannot believe this court intended the Board and these parties to waste their time debating an issue the majority now decides has been closed to debate since 1964.

APPENDIX C.

Judicial Code.

28 USC 1254 (1), 62 Stat. 928.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Public Law 88-108.

"Sec. 2. [Arbitration board]. There is hereby established an arbitration board to consist of seven members.

* * * * * * * *

"Sec. 3. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth.

* * * * * * * *

"Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act [this section and section 158 of this title], the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act [section 159 of this title]. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act [this chapter].

* * * * * * * *

Railway Labor Act, Sec. 7.

Third.

* * * * * * * *

(b) **Organization of board; procedure.**

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) **Duty to reconvene; questions considered.**

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

* * * * * * * *

(e) **Compensation and expenses.**

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling ex-

penses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) **Award; disposition of original and copies.**

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) **Compensation of assistants to board of arbitration; expenses; quarters.**

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration.

* * * * * * *

Railway Labor Act, Sec. 8.

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

* * * * * * *

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

* * * * * * *

Railway Labor Act, Sec. 9.

Award and judgment thereon; effect of chapter on individual employee—Filing of award.

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption;

* * * * * * * *

Effect of partial invalidity of award.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

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APPENDIX D.

United States Court of Appeals
For the District of Columbia Circuit

No. 20,348
No. 20,349

Brotherhood of Railroad Trainmen,
Appellant

v.

Chicago, Milwaukee, St. Paul and Pacific
Railroad Company (Lines East), et al.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

Decided July 27, 1967

Before: Bastian, *Senior Circuit Judge* and Burger and Wright, *Circuit Judges.*

Per Curiam: This is another "manifestation of a litigation syndrome that seems to keep the railroads and

various governmental entities in the courts on an ancient issue." *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, ... U. S. App. D. C. ..., ..., ... F. 2d ..., ... (Nos. 19,867, 20,003-04, decided May 19, 1967, slip op, p. 1). Issues raised in these appeals have been before this court previously in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., ibid.*, and *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co., et al.*, ... U. S. App. D. C. ..., ... F. 2d ..., ... (Nos. 20,212-13, decided May 19, 1967). Our prior opinions are controlling and dispositive of these issues and there is no need to supplement those opinions.

In addition, however, Appellant Brotherhood raises a new claim in these appeals. It now contends that the hearing before the Special Board of Adjustment did not afford it due process of law because of certain alleged procedural irregularities not heretofore considered.[1] Although these issues were exhaustively discussed and found to be without merit in Judge Robinson's original decision in the District Court, *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 237 F. Supp. 404, 418-25 (D. D. C. 1964), we remanded that case to Board 282 in order that it might pass upon these issues. *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 120 U. S. App. D. C. 295, 345 F. 2d 985 (1965). The Board concluded that the alleged procedural irregularities, considered singly or together, did not deprive the B. R. T. of the minimum essentials of a full and fair hearing.

[1] Specifically the union claims that it was impossible to decide the job assignments in 60 days; that the hearing held in the company offices was inherently unfair and offered little time or space for interviews with witnesses; that there was a failure to allow a reasonable time to submit written exhibits; that the "referee" was not neutral; and that the "findings" were prepared by the company and submitted to the referee for approval.

We have previously upheld the Board determination that due process was not violated by lack of a transcript; we similarly affirmed the Board decision that a "meaningful review" had been provided. Although it would appear that the specific defects raised here are subsumed within the due process concept of "meaningful review" we did not discuss them in our prior opinions. We have now fully examined the claim newly raised on this appeal, and we find it to be without merit.

Affirmed.

Wright, *Circuit Judge, dissenting*: Public Law 88-108[1] provides that the compulsory arbitration required in this case "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act." Pub. L. 88-108, § 4. As I have indicated in my dissents in *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co., et al.*, Nos. 20,212-3, and *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific RR Co., et al.*, Nos. 19,867, 20,003 and 20,004, decided May 19, 1967, the Compulsory Arbitration Board convened pursuant to Public Law 88-108 cannot avoid this statutory requirement by delegating portions of its authority to local boards.

In these cases appellant makes the additional point that the local board deprived it of the minimum essentials of a full and fair hearing in that, among other things, it was denied a reasonable opportunity to prepare its case, to call witnesses, and to conduct cross-examination. The company, of course, argues that the board hearing was full and fair. Since, in violation of Section 7 of the Railway Labor Act[2] and in spite of appellant's request, no transcript of the proceedings before the local board was provided, I am unable to resolve this due process issue on this record.

I respectfully dissent.

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[1] 77 Stat. 132 (1963), 45 U. S. C., § 157 (1964).

[2] 45 U. S. C., § 157 (1964).

APPENDIX E.

Excerpt From Pages 10 and 11 of Brief for Appellees in Brotherhood of Railroad Trainmen, Appellant, v. Certain Carriers Represented by the Eastern, Western & Southeastern Carriers Conference Committees, and Particularly the Missouri Pacific Railroad Company, Natchez & Southern Railway Company and the Texas & Pacific Railroad Company, Appellees, No. 18,844 in the United States Court of Appeals for the District of Columbia Circuit, 349 F. 2d 207 (1965).

"When the carriers, after January 25, 1964, commenced initial steps looking toward the putting into effect of provisions of the Award of Arbitration Board No. 282, numerous questions were raised with respect to the correct interpretation of various provisions of that Award. Both the carriers and the labor organizations, including the BRT, requested the Arbitration Board to reconvene to pass upon specified questions said to include disputes by the parties as to meaning and application of the Award.

* * * * * * * *

Question No. 21, submitted by the BRT on May 21, 1964, reads:

"Is our understanding correct that special boards of adjustment established pursuant to the award of Arbitration Board 282, Section III, Part B, having no procedure stipulated by agreement, must therefore conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act, to the extent that said sections are not inconsistent with Public Law 88-108, and that the awards of those special boards are subject to Section 9 of the Railway Labor Act?"

The Board on September 16, 1964 declined to answer this question and referred the parties to the decision in this case by the court below."

APPENDIX F.

Pages 62-65 of the Joint Appendix in Brotherhood of Railroad Trainmen, et al., Appellants, v. The Akron & Barberton Belt Railroad Company, et al., Appellees, Number 20152. In the United States Court of Appeals for the District of Columbia Circuit.

Stipulation as to Facts.

The undersigned parties hereby stipulate and agree, by and through counsel, for the purpose of this case as follows:

A. A number of awards have been made by special boards of adjustment constituted pursuant to Article III of the Award by Arbitration Board No. 282. Such special board awards include those listed below relating to plaintiffs in this proceeding.

Carrier	*Organization*	*Date*
Atchison, T. & S. F. R. Co. and Panhandle & S. F. R. Co.[1]	BRT	Sept. 10, 1965
Atchison, T. & S. F. R. Co.	BRT	Jan. 13, 1966
Atlantic Coast Line R. Co.	BRT	Nov. 24, 1964
Bangor & Aroostock Railroad Co.	BRT	May 29, 1964
Belt R. Co. of Chicago	BRT	July 21, 1964
Belt R. Co. of Chicago	BRT	Jan. 5, 1966
Boston & Maine Corporation	BRT	Oct. 1, 1964
Buffalo Creek Railroad Co.[2]	SUNA	June 23, 1965

[1] The Panhandle & Santa Fe Railway Co. is now part of the Atchison, Topeka and Santa Fe Railway Co.

[2] The listing herein of the award by a special board of adjustment with respect to the Buffalo Creek Railroad Co. and the SUNA is without prejudice to the position of either party in *Switchmen's Union of North America, et al. v. Buffalo Creek Railroad Co., et al.*, Civil Action No. 11,422, now pending in the United States District Court for the Western District of New York.

Carrier	*Organization*	*Date*
Camas Prairie Railroad Co.	SUNA	Sept. 8, 1965
Chesapeake & Ohio R. Co.	BRT	Sept. 2, 1965
Chesapeake & Ohio R. Co.	BRT	Oct. 20, 1965
Chicago & Eastern Illinois R. Co.	BRT	Jan. 17, 1966
Chicago, M. St. P. & P. R. Co. (Award No. 1)	BRT	July 10, 1964
Chicago, M. St. P. & P. R. Co. (Award No. 2)	BRT	July 10, 1964
Chicago, M., St. P. & P. R. Co.	BRT	Aug. 28, 1964
Chicago, M., St. P. & P. R. Co.	BRT	Dec. 9, 1964
Chicago, M., St. P. & P. R. Co. and The Kansas City Southern R. Co. (Milwaukee-Kansas City Southern Joint Agency)	BRT	Dec. 30, 1964
Chicago & North Western R. Co.:		
CSTPM&O District—Award No. 1	BRT	Aug. 27, 1964
CSTPM&O District—Award No. 2	BRT	Aug. 27, 1964
L&M District—Award No. 1	BRT	Aug. 27, 1964
M&STL District—Award No. 1	BRT	Aug. 27, 1964
C&NW District—Award No. 1	BRT	Aug. 31, 1964
C&NW District—Award No. 2	BRT	Aug. 31, 1964
C&NW District—Award No. 3	BRT	Aug. 31, 1964
C&NW District—Award No. 4	BRT	Aug. 31, 1964
M. I. District—Award No. 1	BRT	Aug. 31, 1964
M&STL District—Award No. 1	SUNA	Aug. 27, 1964
Chicago, Rock Island & P. R. Co.	SUNA	Sept. 15, 1964
Chicago, Rock Island & P. R. Co.	SUNA	Nov. 20, 1965
Chicago & W.I.R. Co.	BRT	Dec. 12, 1964
Cincinnati Union Terminal Co.	BRT	Aug. 3, 1965
Clinchfield R. Co.	SUNA	Aug. 26, 1965
Colorado & Southern R. Co.	BRT	July 21, 1964
Davenport, R. I. & N. W. R. Co.	SUNA	Aug. 27, 1964

Carrier	*Organization*	*Date*
Ft. Worth & Denver R. Co.	BRT	May 20, 1964
Ft. Worth & Denver R. Co.	SUNA	May 27, 1964
Great Northern R. Co.	SUNA	Dec. 2, 1965
Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co.	BRT	Jan. 25, 1966
Illinois Central R. Co.	BRT	Sept. 14, 1964
Illinois Central R. Co.	BRT	Nov. 30, 1964
Illinois Central R. Co.	BRT	Feb. 26, 1965
Illinois Central R. Co.	BRT	Oct. 26, 1965
Jacksonville Terminal Co.	BRT	Nov. 5, 1965
Kansas City Terminal R. Co.	SUNA	Dec. 21, 1964
Kansas City, Oklahoma & G. R. Co.	BRT	June 6, 1964
Kentucky & Indiana T. R. Co.	BRT	Aug. 17, 1964
Kentucky & Indiana T. R. Co.	BRT	Mar. 22, 1965
King Street Passenger Station	BRT	Jan. 4, 1965
Maine Central Railroad Co.	BRT	May 29, 1964
Midland Valley R. Co.	BRT	June 6, 1964
Minnesota, Dakota & Western R. Co.	BRT	Dec. 11, 1965
Missouri-Illinois R. Co.	BRT	Apr. 22, 1964
Missouri-Kansas-Texas R. Co.	BRT	May 14, 1964
Missouri Pacific R. Co. (Northern, Central and Southern Districts)	BRT	May 6, 1964
Missouri Pacific R. Co. (Gulf District)	BRT	May 6, 1964
Natchez & Southern R. Co.[3]	BRT	May 6, 1964
Missouri Pacific Railroad Co. New Orleans & L. C. R. Co.	BRT	May 14, 1964
New Orleans U.P. Terminal	BRT	May 23, 1964
Norfolk & Western R. Co.	BRT	Jan. 5, 1966
Norfolk & Western R. Co.	BRT	Jan. 7, 1966

[3] The Natchez and Southern Railway Co. is now a part of the Missouri Pacific Railroad Co.

Carrier	*Organization*	*Date*
Norfolk & Western R. Co.	BRT	Jan. 21, 1966
Northern Pac. T. Co. of Oregon[4]	SUNA	July 15, 1965
Port Terminal R. Ass'n	BRT	May 14, 1964
Reading Company (Case No. 1)	BRT	Nov. 19, 1965
Reading Company (Case No. 2)	BRT	Nov. 19, 1965
Richmond, F. & P. R. Co.	BRT	Jan. 20, 1966
St. Louis Southwestern R. Co.	BRT	July 14, 1964
St. Louis & S. F. R. Co.	BRT	June 6, 1964
St. Paul Union Depot Co.	SUNA	Nov. 1, 1965
St. Paul Union Depot Co.	SUNA	Jan. 24, 1966
Southern Pacific Co.	BRT	June 4, 1964
Southern Pacific Co.	SUNA	Sept. 8, 1964
Southern Pacific Co.	SUNA	June 17, 1965
Southern Pacific Co.	SUNA	Nov. 22, 1965
Spokane, P. & S. R. Co.	BRT	Nov. 15, 1965
Terminal R. Ass'n of St. L.	BRT	Oct. 16, 1964
Texas & Pacific R. Co.[5]	BRT	May 6, 1964
Texas Pacific-Missouri Pacific Term. R. Co. of N. O.	SUNA	May 16, 1964
Union Railway Co.	BRT	May 14, 1964
Union Term. & St. J. Belt R. Cos.	BRT	May 15, 1964
Wabash Railroad Co.[6]	BRT	Undated
Washington Terminal Co.	BRT	Oct. 15, 1964
Washington Terminal Co.	BRT	Nov. 26, 1965

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[4] The Northern Pacific Terminal Company of Oregon now is the Portland Terminal Railroad Company.

[5] The special board award also applies to subsidiaries of the Texas & Pacific Railway Company—Abilene & Southern Railway, Fort Worth Belt Railway Co., Texas-New Mexico Railway Co. and the Weatherford, Mineral Wells & North Western Railway Co.

[6] The Wabash Railroad Co. is now a part of the Norfolk and Western Railway Co.

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN and SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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IN THE

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v.

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*Respondents.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases § 11,928. The opinion of the District Court (JA 89-91) is reported at 248 F. Supp. 1008.

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* For reasons best known to itself, petitioner has included as respondents in the caption of its petition "Certain Carriers Represented by the Eastern, Western & Southeastern Carriers' Conference Committee" in addition to the named individual railroad on whose behalf this brief is filed, Ralph T.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 47 that its Award does not require special boards of adjustment created pursuant to the Award to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act constitutes a permissible interpretation of the language of the Award?

2. If the answer to the above question is in the affirmative, whether a judgment in a prior proceeding between the same parties, among others, upholding the validity of the Award is *res judicata* and bars any attack in this proceeding upon the validity of the Award as so interpreted?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads (including this respondent) with Section 6 notices of various counterproposals, including a proposal by petitioner to

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Seward and the United States. The only railroad named as a respondent in the court below was that railroad—the St. Louis Southwestern Railway Company. In order to avoid confusion, however, we have adopted the caption utilized by petitioner.

establish a rule requiring the use of at least two trainmen on all crews in road and yard services. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. Section III of the Award (JA 53-59) by Arbitration Board No. 282 related to the crew-consist issue. It provided, among other things, that no change could be made in existing rules requiring a stipulated number of trainmen to be used on crews in road and yard service except by agreement or pursuant to the procedures established by the Award. In general, those procedures permitted either a carrier or a union to serve the other with written notice of proposed changes in rules requiring a stipulated number of trainmen, provided that they should confer and attempt to reach agreement upon such proposals in the light of "guidelines" or standards specified in the Award, and provided that, if no agreement was reached, the dispute could be submitted by either party to a special board of adjustment (composed of one representative of the carrier, one representative of the union and a neutral member) for final decision, pursuant to those guidelines.

Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, contending that the Award did not comply with P.L. 88-108 and was otherwise invalid. The validity

of the Award was upheld, however, in a decision that has become final. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

The crew-consist provisions of the Award became effective on January 25, 1964, and this respondent served petitioner on February 25, 1964 with a notice pursuant to the Award of proposed changes in its rules requiring a stipulated number of trainmen on crews in road and yard service (JA 12-13). Shortly thereafter, petitioner served a counternotice (JA 13-15). After negotiations between the parties failed to result in an agreement, respondent referred the dispute to a special board of adjustment (JA 8, 16-17). The special board rejected a contention by petitioner that Sections 7 and 8 of the Railway Labor Act (45 U.S.C. § 157, 158) applied to special boards of adjustment created under Award 282, so as to require the special board to make a transcript of its proceedings and take evidence under oath (JA 27-28, 42). However, each party was informed that it could have a court reporter present to make a transcript of the proceedings if it desired to do so, and the witnesses testified under oath (JA 42-43). Neither party arranged for a transcript to be made (JA 42), but written submissions by the parties were exchanged as requested by petitioner (JA 29-30, 42-43). In addition to receiving written submissions, exhibits and oral testimony, the special board made on-the-ground observations of a significant part of the affected territory, including observations of actual operations (JA 44), and considered other special board awards and crew-consist agreements under Award 282 for whatever precedential value that may have had (JA 43-44).

The special board of adjustment issued its award on July 14, 1964 (JA 30-31). Some time thereafter, petitioner sub-

mitted BRT Question No. 47 to Arbitration Board No. 282. Insofar as now relevant,[1] that question reads (JA 3-4, 33) as follows:

> "Is the award of the Special Board of Adjustment (St. Louis Southwestern Railway Co.) valid, considering each of the following and if not, by reason of which of the following:
>
> "(a) The refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence offered to and received by such Special Board of Adjustment and the refusal of such board to grant the request or demand of the Brotherhood of Railroad Trainmen for it to proceed only in accordance with § 7 of the Railway Labor Act to the extent of taking testimony under oath and making and certifying a transcript of its proceedings and of the evidence and papers presented to. . . ."[2]

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[1] Parts (b) and (c) of BRT Question No. 47 related to the propriety of the consideration by the special board of other special board awards and crew-consist agreements. No issue has been raised in the petition with the respect to the ruling by Board 282 insofar as it upheld that practice.

[2] The purported "refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence" actually consisted of a request that this respondent join with petitioner in asking the National Mediation Board to "pay the costs and expenses of the neutral member and any incidental expenses" in connection with the special board proceedings (JA 24-25, 41-42). Section III-B(3) of the Award (JA 56) provides that the "costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement," and as respondent pointed out in refusing petitioner's request, the Mediation Board had already advised the parties that it would not pay such expenses in view of that provision (JA 26-27, 42).

Board 282 answered (JA 4, 33), on January 16, 1966, that:

> "There is no basis for concluding that the Award of the Special Board of Adjustment is invalid for the reasons referred to in the question. See the Board's Preliminary Statement and its answers to BRT Questions 32, 33 and 36."

As is indicated by the answer to BRT Question No. 47, the issue as to whether Award 282 required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act had previously been submitted to and decided by Board 282. Board 282 had ruled, in its answer on October 10, 1965 to BRT Questions No. 36(B) and (C), that (JA 75):

> "The special boards of adjustment provided for in Section III, Part B, of Award 282 are not required by the terms of the Award to adhere to procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act."

In the Preliminary Statement (JA 60-71) which accompanied the Board's answer to BRT Question No. 36 (and also its answers to BRT Questions No. 32 and 33), the Board noted, among other things, that several of the provisions of its Award are inconsistent with requirements of Sections 7 and 8 of the Railway Labor Act (JA 67-68), and stated that "it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" (JA 68). The Board's detailed explanation of why this was so is set forth in the Joint Appendix filed below at 66-68. In addition, the Board stated (JA 70) that "we deem it incumbent upon any party seeking a meaningful review of the decision of a special board to make such review possible

by filing a timely objection to the proceedings and by providing us with an adequate record" and that (JA 71):

> "By the same token, at party wishing review of a decision by a special board of adjustment must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary; the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost."

The petition to impeach the answer to BRT Question No. 47, filed by petitioner in the United States District Court for the District of Columbia pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, was decided by that court after it had upheld the answer to BRT Question No. 36(B) and (C). Hence, that Court merely followed its earlier decision (JA 90) in upholding the answer to BRT Question No. 47 insofar as the issue involved here is concerned. The Court of Appeals affirmed both of those decisions by the District Court in separate opinions issued on May 19, 1967.

The decision by the court below affirming the refusal to impeach the answer to BRT Questions No. 36(B) and (C) is now before this Court on a petition for writ or certiorari filed by the Brotherhood of Railroad Trainmen in No. 500. The opinion in that case constituted the principal opinion of the court below. The opinion in this case first notes (Pet., App. A, at 1a) that one of the alternative grounds relied upon in that case is not available here, since petitioner "participated in the hearings" before the special board of adjustment involved in this case "and made objections to the special Board's ruling that it was not re-

quired to provide a transcript." Hence, in this case the court below relied upon and followed only its holding in the other case that petitioner's contention that the Award violates P.L. 88-108 and is invalid because it does not require the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act is precluded by the doctrine of *res judicata* (Pet., App. A, at 1a-2a).

Argument

As noted, the courts below in deciding this case relied upon and followed their decisions in the case which is now before this Court on petition for writ of certiorari in No. 500. The Brotherhood of Railroad Trainmen is the petitioner in No. 500 as well as in this case, and the Reasons for Granting the Writ stated in the two petitions are virtually identical. Petitioner does not contend here that the ruling by Board 282 in answer to BRT Question No. 47 is not a reasonable interpretation of the language of Award 282, and petitioner does not question here the merits of the special board award to which that Question applied. Rather, as is true of the petition in No. 500 with respect to the answer to BRT Question No. 36(B) and (C), petitioner attacks only the holding below that it is precluded by principles of *res judicata* from attacking the validity of Award 282 in this proceeding.

We see no need, therefore, to burden the Court with a repetition of the arguments made in the Brief in Opposition filed in No. 500 for the respondents Missouri Pacific Railroad Company, Natchez & Southern Railway Company and The Texas & Pacific Railway Company. The attorneys for those respondents in No. 500 are the same as the attorneys for this respondent, and the arguments made in that Brief have the approval of this respondent.

Consequently, we adopt by reference and incorporate

herein the Argument in that brief insofar as it relates to the *res judicata* issue which is common to both cases. Of course, as the court below pointed out in connection with its decision, we cannot rely in this case upon the alternative ground relied upon in that case—petitioner's failure to participate in the proceedings of the special boards of adjustment involved in that case or to object to the procedures followed by those special boards. Here, petitioner did participate in the proceedings of the special board of adjustment and did contend that (JA 28) "the proceedings of the Board" should be "handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. . . ."

We note, however, that the special board involved here did take the testimony of the witnesses under oath and did mark the exhibits which were received in evidence (JA 42-43, 49). And, while the special board did not itself make and supply the parties with a transcript of the proceedings, both parties were advised that either of them could have a transcript made if it so desired (JA 42-43). See p. 4, *supra*. So, too, Board 282 has ruled that either party to a special board proceeding has a right to have a transcript made at its own expense if it so desires. See p. 7, *supra*. Petitioner did not take advantage of the opportunity thus made available to it, but that is not the fault of the special board, of Board 282 or of this respondent. Basically, therefore, petitioner's complaint is merely that it was not given a free transcript. And, as this Court is aware, a party in a federal court proceeding must pay for any copies of the transcript which he receives unless he is a pauper. See 28 U.S.C. § 753(b). While court reporters are now available pursuant to 28 U.S.C. § 753, that was not always true and prior to the enactment of that statute a party who de-

sired a transcript had to see that a stenographer was present as well as pay for the transcript. *Coulston* v. *United States,* 51 F. 2d 178, 180 (10th Cir., 1931). Plainly, therefore, petitioner has not been deprived of any fundamental rights.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ AND SOUTHERN RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282 AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RALPH T. SEWARD AND UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 499 (Pet. App. 1a–2a) is not yet reported. The opinion

of the district court in No. 499 is reported at 252 F. Supp. 961.

The opinion of the court of appeals in No. 500 (Pet. App. 1a–6a) is not yet reported. The opinion of the district court in No. 500 is reported at 248 F. Supp. 1008.

JURISDICTION

The opinion and judgment of the court of appeals in both No. 499 and No. 500 were entered on May 19, 1967. The petitions for writs of certiorari were filed on August 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question presented by these two petitions is whether petitioner is barred, under principles of *res judicata,* from relitigating the question whether the special boards of adjustment, created under the Award of Arbitration Board 282, were required to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act, where that issue could have been raised in earlier litigation between the same parties in which the validity of the Award of Arbitration Board 282 was sustained.

A subsidiary question presented by the petition in No. 500 is whether petitioner may complain of the procedures employed by special boards of adjustment in proceedings in which petitioner refused to participate and, hence, never objected to the procedures employed.

STATEMENT

The present litigation arises from a lengthy dispute between the railroads and their unions regarding the

abolition of firemen's jobs and the composition of crews in road and yard service. In August 1963, the inability of the parties to compose their differences led to the passage by Congress of Public Law 88-108 (77 Stat. 132); which provided for the establishment of an arbitration board. That board, known as Arbitration Board 282, rendered its award on November 26, 1963, to be effective on January 25, 1964.

Section III of the Award dealt with the composition of road and yard crews. Board 282 found that a national prescription of crew size would be unrealistic,[1] and its Award therefore provided for disposition of the "crew consist" issue on a local basis in accordance with procedures and guidelines specified in the Award. The Award provided that, if the union and railroad could not reach agreement upon proposed changes in existing crew-consist rules, the dispute was to be referred to a local special board of adjustment. One member of the special board was to be named by each of the two disputants, and a third member was to be chosen by the two partisan members or, if they could not agree, by the National Mediation Board. The decision of the majority of each special board was to be binding on both parties. The Award set forth in detail guidelines which special boards were to follow in making their binding dispositions. They were instructed to take account of such factors as the requirements of safety, the avoidance of unreasonable burdens on crew members, changes in operating conditions, the physical characteristics of

[1] See Opinion of the Neutral Members, 41 Lab. Arb. 680, 694 (1964).

the line to be traversed, and the number of highway crossings to be protected.

Although Section 4 of Public Law 88–108 provided that the proceedings before the statutory arbitration board (*i.e,* Board 282) were to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act (45 U.S.C. 157, 158) "to the extent not inconsistent" with Public Law 88–108, the Award of Board 282 did not impose a similar requirement on the special boards of adjustment. Indeed, in a number of respects the Award of Board 282 established rules of procedure for the special boards quite different from those specified in Sections 7 and 8 of the Railway Labor Act. For example, Section 7, Third(e) of the Act, provides that the National Mediation Board shall bear the expenses of neutral arbitrators; Section III–B(3) of the Award, on the other hand, provided that "the costs and expenses of the neutral member [of each special board] and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement" (J.A. No. 500,[2] p. 7). In general, Board 282 determined that resolution of crew-consist disputes by special boards would best be served by more informal and expeditious procedures than those provided by the Railway Labor Act.[3]

[2] "J.A. No. 500" refers to the Joint Appendix filed in the court of appeals in No. 500. "J.A. No. 499" refers to the Joint Appendix filed in the court of appeals in No. 499.

[3] In response to a question presented by petitioner, Board 282 pointed out (J.A. No. 500, pp. 59–62):

> * * * The procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes;

In an action brought by petitioner and several other unions, both the constitutionality of Public Law 88-108 and the validity of the Award of Board 282 were sustained. *Brotherhood of Loc. F. & E. v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918. As the district court opinion in that case discloses, the unions attacked the validity of the Award on numerous grounds; they did not, however, contest the failure of the Award to require the special boards of adjustment to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act.

On January 25, 1964, after the district court's decision in *Brotherhood of Loc. F. & E. v. Chicago,*

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moreover, by definition they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.

* * * * *

Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third(f) requires that the arbitration board shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements.

B. & Q. R. Co., supra, but before the court of appeals had affirmed that decision, several carriers invoked the procedures of the Award by serving petitioner with notices of proposed changes in rules governing crew composition.

With respect to the carriers involved in No. 500—the Missouri Pacific, Texas and Pacific, and Natchez & Southern Railroads—petitioner flatly refused to negotiate over the proposed changes, contending that the carriers' notices had been served prematurely (J.A. No. 500, pp. 72, 83, 92, 101). Thereafter, when special boards of adjustment were convened, petitioner refused to participate in the proceedings before them. These special boards therefore made findings and awards based upon the written evidence and arguments submitted by the carriers.[4]

With regard to the carrier involved in No. 499, petitioner did participate in the special board proceedings, although it objected to the conduct of the hearing

> * * * except and unless proceedings of the Board are handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make a transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. [J.A. No. 499, p. 28.]

[4] Petitioner's assertion (Pet. No. 500, p. 5) that the special boards authorized all changes requested by the carriers is contrary to the record, which shows that several proposals were rejected as not justified under the guidelines set forth in the Award, or as being outside the scope of the Award (see J.A. No. 500, pp. 76–79, 87, 96, 98).

This position was rejected by the special board. However, petitioner's requests that it be furnished a copy of the carrier's written submission and that testimony be taken under oath were granted. At the start of the hearing, each party was told that it could arrange to have a court reporter make a transcript of the proceeding if it so desired. Neither the carrier nor petitioner made such an arrangement (J.A. No. 499, p. 42).

Following the completion of the special board proceedings, petitioner commenced an action to enjoin the carriers in No. 500 from reducing crews in accordance with the special board awards. On June 8, 1964, the district court denied this relief, rejecting, *inter alia,* petitioner's contention that the special boards were required to follow the procedures of Sections 7 and 8 of the Railway Labor Act. 231 F. Supp. 519 (D.D.C.). On June 24, 1965, the court of appeals, however, ruled that "such questions properly come within the purview of [Board 282's] primary jurisdiction," and remanded the case to the district court with instructions to afford the parties an opportunity to seek clarification from Board 282. *Brotherhood of R. Trainmen* v. *Certains Carriers,* 349 F. 2d 207 (C.A.D.C.).

Petitioner then inquired of Board 282 whether special boards of adjustment were required to comply with the procedures set forth in Sections 7 and 8 of the Railway Labor Act.[4] Board 282 replied in the negative (J.A. No. 500, pp. 54–71; J.A. No. 499,

[4] See Question 36 (J.A. No. 500, pp. 66–71) and Question 47 (J.A. No. 499, pp. 77–78).

pp. 77–78). The Board explained that it "was never our intention that the special boards of adjustment * * * would be subject to Sections 7 and 8," that the omission of such procedural requirements from the Award was "deliberate," and that the Award had left no doubt of the Board's intentions in this regard (J.A. No. 500, pp. 59–61).

Petitioner then initiated the present proceedings to impeach the Board's explanatory rulings. The district court sustained the Board's rulings in two decisions. 248 F. Supp. 1008; 252 F. Supp. 961. On May 19, 1967, the court of appeals affirmed both of the district court's decisions on the ground that the petitioner's failure to raise the issue of whether special boards of adjustment were required to conform to requirements of Sections 7 and 8 to the Railway Labor Act, in its previous challenge of the validity of the Award of Board 282,* barred the present attack on the procedures followed by the special boards (Pet. App. No. 499, pp. 1a–4a; Pet. App. No. 500, pp. 1a–6a). In No. 500, the court sustained the rulings of Board 282 and the district court on the additional ground that petitioner could not complain of the procedures followed by special boards in which it deliberately refused to participate (Pet. App. No. 500, pp. 4a–6a).

ARGUMENT

The court below was clearly correct in ruling that its previous decision upholding the validity of the

* *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918.

Award of Board 282, *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co., supra,* was *res judicata* as to the question of whether special boards of adjustment were required to follow the procedures set forth in Sections 7 and 8 of the Railway Labor Act. The *res judicata* question, as well as the issue as to the procedures to be followed by special boards, turn on the peculiar circumstances surrounding the Arbitration Award under Public Law 88–108, which Award expired by its own terms in early 1966. Those issues are not likely to recur, no conflict between the circuits is involved, and further review by this Court seems unwarranted.

1. It is well settled that "a judgment for the merits in one suit is res judicata in another, where the parties and the subject matter are the same, not only as respects matter actually presented to sustain or defeat the right asserted but also as to any other available matter which might have been presented." *Midessa Television Co.* v. *Motion Pictures for Television, Inc.*, 290 F. 2d 203 (C.A. 5), certiorari denied, 368 U.S. 827; *Calvin* v. *Calvin,* 214 F. 2d 226 (C.A.D.C.); see also, *Commissioner* v. *Supnen,* 333 U.S. 591, 597; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352.

The present actions fall squarely within that principle. Petitioner clearly could have contested the very issue it raises here when it attacked the validity of the Award of Board 282, for that Award not only did not require the special boards to follow Sections 7 and 8 of the Railway Labor Act, but specified a number of procedures quite different from those specified in that Act. Indeed, in the earlier

action, petitioner did attack, unsuccessfully, one of the procedures (for the sharing of costs of the neutral arbitrator) which clearly was not in conformity with Section 7, albeit the attack was not on that ground. See 225 F. Supp. at 21.[7] It is evident that, were petitioner's contentions accepted here, the Awards itself would be invalid insofar as it failed to require special boards to comply with Sections 7 and 8. Having had full opportunity to litigate the validity of the Award, petitioner may not undercut it, after adjudication, in these collateral proceedings.

The present actions are a particularly undesirable form of piecemeal litigation. The Award of Board 282 called for expeditious local disposition of the crew-consist issue (J.A. No. 500, pp. 6–7). Yet with time of the essence, petitioner waited until the special boards exercised the freedom from what Board 282 deemed the "cumbersome" procedures of Sections 7 and 8 (J.A. No. 500, p. 60) and then sought by the present litigation to undo the work of the special boards, thus precluding the prompt settlement of the issue. In these circumstances, the court of appeals properly held the suits barred by *res judicata*.

2. In No. 500, the court of appeals also correctly ruled that the attack on the procedures employed by the special boards was precluded by petitioner's deliberate refusal to participate in the proceedings. It is settled that a party may not upset an administra-

[7] Petitioner contended that Board 282 "lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards." Section 7, Third(e) of the Railway Labor Act, 45 U.S.C. 157, Third(e), provides that the National Mediation Board shall bear such expenses.

tive or arbitral determination on grounds not raised before the decision-making body, particularly where the objections are procedural. *E.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 627 (C.A. 3), certiorari denied, 348 U.S. 871; *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589 (C.A. 7).

3. We also note that there is no merit in petitioner's underlying contention that its rights under Public Law 68–108 and the Due Process Clause were violated by the failure of Board 282 to require the special boards to follow the procedures of Sections 7 and 8 of the Railway Labor Act, particularly by providing transcripts of their proceedings. None of the special boards refused to permit petitioner to have a transcript of the proceedings, if it desired. The board in No. 499, before which petitioner appeared, expressly invited either party to make a transcript. Petitioner can hardly complain that its right to "meaningful review" is frustrated by the lack of a transcript which it could have obtained, had it chosen to do so. Surely, in the absence of a showing of indigence, the failure to provide petitioner with a *free* transcript cannot impair any constitutional right. Moreover, it is not generally required that formal records be made in arbitral proceedings. See *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203–204, n. 4.[8] For

[8] A transcript of oral testimony is not in fact essential to the limited review which may be obtained of the final and binding decision rendered in arbitration. The decision of an arbitrator is not subject to review on the merits; it is at most reviewable to determine whether the arbitrator stayed within the sub-

example, transcripts of oral testimony are not ordinarily made in proceedings before the National Railroad Adjustment Board (See J.A. No. 500, p. 19).

Similarly, the argument that Public Law 88–108 required that the particular procedures of Sections 7 and 8 of the Railway Labor Act be followed by the special boards of adjustment is without merit. The "arbitration" that Public Law 88–108 required to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act was the arbitration by Board 282; that arbitration was, under Section 3 of Public Law 88–108, to "constitute a complete and final disposition" of the issues. The contention by petitioner and other unions in *Brotherhood of Loc. F. & E.* v. *Chicago B. & Q. R. Co., supra,* that the Award of Board 282 was invalid because it did not finally dispose of the issues insofar as it provided for further proceedings before local special boards of adjustment, was explicitly rejected. 225 F. Supp. at 20–21, affirmed, 331 F. 2d 1020. Hence, petitioner's present argument that the special boards of adjustment were required to adhere to the procedures of Sections 7 and 8 because part of the arbitration which Board 282 was required to conduct in accordance with those sections was delegated to the special boards is merely repetitive of the rejected contention that Board 282 failed to complete its statutory assignment. If Congress left Board 282 with the leeway to create the local special boards, as settled in *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.,*

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mission agreement (or, in these cases, within the Award of Board 282). *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 598.

supra, surely Board 282 also acted within its authority in permitting those special boards to employ procedures flexible enough to accomplish the desired prompt, local disposition of the crew-consist issue.[9]

In all events, given the expiration of Public Law 88–108 in 1964 and of the Award of Board 282 in 1966, in accordance with their respective terms, none of these issues is of such prospective significance as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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[9] Board 282 expressly found that the procedures of Sections 7 and 8 were too formal and cumbersome to accomplish its purposes in establishing the special boards (J.A. in No. 500, p. 60).

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BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner,*

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, ETC., *Respondents.*

PETITIONER'S REPLY TO OPPOSITIONS TO PETITIONS FOR CERTIORARI

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Respondents' briefs give additional evidence of the importance of a determination by this Court of the validity of awards of Special Boards of Adjustment to which Arbitration Board 282 delegated substantially all of the arbitration of the crew-consist issue required by Public Law 88-108.

If the rulings of the Court below in *Akron & Barberton Belt R. Co., et al.* v. *Brotherhood of Railroad Trainmen* (referred to at page 9 of Respondents' Opposition in No. 500) become final and the changes in

crew consist which were authorized by Special Board awards continue until again changed in accordance with the Railway Labor Act, and if the information given by counsel for the United States is correct (Br. 7 in No. 500) that practically none of the special boards kept a stenographic record [as required by § 4 of Public Law 88-108 and § 7 Third (g) of the Railway Labor Act], it is most certainly of great importance to the railroads and the thousands of railroad employees, who work under those special board awards which changed their working conditions, for this Court to determine the question as to the validity of those rules to which those men have been, are, and may continue to be subject in their day by day work for an indefinite time in the future.

The importance of this Court determining the question is further magnified by the vacillating and conflicting opinions of Arbitration Board 282 and of the Courts below as shown in the petitions filed herein, the last of which decisions, by the Court below, would foreclose a determination of the validity of those Special Board awards after another panel of the Court below had, as it now appears, teased petitioner and the railroad employees represented by petitioner by leading them to believe in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, 345 F.2d 985 (1965) and *Brotherhood of Railroad Trainmen* v. *Certain Carriers, etc.*, 349 F.2d 207 (1965) that the validity of the awards would be determined by the courts after initial review by Arbitration Board 282. In the last mentioned case the carriers argued, as they did in these cases, that the judgment in the original impeachment suit was *res judicata*, and the Court, *sub silentio*, rejected that argument at that time and remanded the case for further proceedings.

If anything is *res judicata,* it would seem that the decision in 349 F.2d 207 should be *res judicata* that the decision in the original impeachment suit was not *res judicata* that the provisions of sections 7 and 8 of the Railway Labor Act do not apply to the proceedings of the Special Boards.

Respondents incorrectly argue (Br. 10 in No. 500) that petitioner does not contend that the ruling by Arbitration Board 282, purporting to excuse its delegee, the Special Board of Adjustment, from taking evidence under oath and making and certifying a transcript of its proceedings and of the evidence taken by it, was not a reasonable interpretation of its award. Petitioner does contend that such ruling by Board 282 and similar rulings by the Courts below were contrary to Public Law 88-108. Surely such a ruling would be "unreasonable" if it is in violation of the law.

Cases arising under the Administrative Procedure Act, such as *United States* v. *Tucker Truck Lines,* cited by the Court below and Respondents (Br. 10 in No. 500) are not relevant to this case. Public Law 88-108 required arbitration and required that it be conducted pursuant to §§ 7 and 8 of the Railway Labor Act and that it be subject to § 9 of that Act. Public Law 88-108 made no mention of the Administrative Procedure Act, but, instead, using mandatory language, provided for the arbitration to be conducted pursuant to the mandatory provisions of §§ 7, 8, and 9 of the Railway Labor Act—not the Administrative Procedure Act.

There is no inconsistency between § 4 of Public Law 88-108 and the Award of Arbitration Board 282 and those subsections of §§ 7, 8, and 9 of the Railway Labor Act as to *how* the arbitration should be conducted.

Section 4 of Public Law 88-108 provided that: "To the extent not inconsistent with this joint resolution, the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act."

Only sub-sections Third (b), (f), (g), and (h) of § 7 of the Railway Labor Act are concerned with the *conduct* of an arbitration.

The Award of Arbitration Board 282 required the parties to the Special Board, for which it provided and to which it delegated the arbitration, to share the expenses of the neutral member, while § 7 Third (e) of the Railway Labor Act provides for the neutral to be paid by the National Mediation Board. That is the only inconsistency between the Award of Arbitration Board 282 and § 7 of the Railway Labor Act.

Surely that single inconsistency, having nothing to do with the actual conduct of an arbitration, should not have been a warning to petitioner in 1963 when it was required to institute an action to contest the validity of the Award of Board 282 that the Award could or should have been considered invalid because it did not expressly require a Special Board of Adjustment to comply with § 7 Third (b) which requires an arbitration board to give the parties a full and fair hearing including an opportunity to present evidence in support of their claims, either in person or by counsel, nor because it did not expressly require a Special Board of Adjustment to comply with that part of § 7 Third (h) which requires an arbitration board to take all testimony under oath, nor because it did not expressly require a Special Board to comply with that part of § 7 Third (g) which authorizes an arbitration

board to employ and pay assistants necessary to carry on the arbitration which could have been done consistently with the Award of Board 282, nor because the Award of Board 282 did not expressly require the Special Board of Adjustment to comply with that part of § 7 Third (f) which requires an arbitration board to make, certify, and file a transcript of its proceedings, of the evidence taken by it, and its award.

While the Award of Board 282 was silent as to those matters last mentioned, § 4 of Public Law 88-108 and § 7 of the Railway Labor Act were clear and mandatory as to them.

But the Court below ruled *res judicata* the question of whether the Special Boards were required to comply with those last mentioned requirements of § 7 of the Railway Labor Act on the theory that the Award of Board 282 would have been subject to impeachment by not expressly requiring compliance with them, notwithstanding § 4 of Public Law 88-108 did impose such requirements and notwithstanding no special boards could have then been convened so as to have conducted the arbitration delegated to them in compliance with or in violation of those requirements.

Petitioner's complaint has nothing to do with the validity of the Award of Arbitration Board 282. The complaint which petitioner makes could not have been made in December of 1963 when petitioner was required to institute an action to contest the validity of the Award of Board 282 except as a bare speculative possibility that the special boards would proceed in violation of the provisions of § 4 of Public Law 88-108 and §§ 7, 8, and 9 of the Railway Labor Act because the Award of Board 282 was silent as to whether they should so proceed.

Petitioner's complaint is and has been exclusively with respect to the validity of the awards of Special Boards of Adjustment, delegees of Board 282 which were not, as they could not have been, established until months after petitioner was required by § 4 of Public Law 88-108 and § 9 of the Railway Labor Act to institute an action, if any was to be instituted, to contest the validity of the Award of Board 282 and is based upon the failure of special boards to comply with § 4 of Public Law 88-108 and §§ 7, 8, and 9 of the Railway Labor Act in conducting the arbitration delegated to them as Arbitration Board 282 itself was required to and had done months before any special board was or could have been established.

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